INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, constitutional provision, and rule involved	2
Statement	4
Argument	7
Conclusion	9

CITATIONS

Case:	
Steele v. *United States*, 267 U. S. 498	8, 9
Statutes, Constitutional Provision:	
Internal Revenue Code:	
53 Stat. 303, 26 U. S. C. 2803:	
Secs. 2803 (a)	2
Secs. 2803 (g)	2
53 Stat. 345, 26 U. S. C. 2913:	
Sec. 2913	3
Espionage Act of June 15, 1917, Title XI, c. 30, 40 Stat. 228, 18 U. S. C. 612:	
Sec. 3	8
Fourth Amendment to the Constitution	3
Miscellaneous:	
Rule 41 (c) of the Federal Rules of Criminal Procedure	3, 8

745857—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1394

MARTIN FLETCHER LOWREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 90–100) has not yet been reported. The opinions of the district court appear at pages 12–14 and 20–23 of the record, and its findings of fact and conclusions of law appear at pages 19–20.

JURISDICTION

The judgment of the circuit court of appeals was entered April 28, 1947 (R. 100). The petition for a writ of certiorari was filed May 20, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether an affidavit of probable cause which carries the inescapable import that a warrant is sought to search for non-tax-paid liquor is sufficient to suport a search warrant specifying non-tax-paid liquor as the object of the search.

2. Whether the indictment sufficiently alleged the venue of the offenses charged.

STATUTES, CONSTITUTIONAL PROVISION, AND RULE INVOLVED

Section 2803 of the Internal Revenue Code, 53 Stat. 303, 26 U. S. C. 2803, provides in pertinent part:

> (a) *Requirement.*—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * * *
>
> (g) *Penalties.*—Any person who violates any provision of this section, * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

Section 2913 of the Internal Revenue Code, 53 Stat. 345, 26 U. S. C. 2913, provides:

> Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 (c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> A warrant shall issue only on affidavit sworn to before the judge or commissioner

> and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the Western District of Arkansas. The first count charged a violation of Section 2803 of the Internal Revenue Code in that, on May 4, 1946, in the Hot Springs Division of the Western District of Arkansas, within the jurisdiction of the district court, petitioner had in his possession 91 gallons of distilled spirits, the containers of which did not bear the required revenue stamps. The second count charged a violation of Section 2913 of the Internal Revenue Code by the concealment of 91 gallons of whiskey upon which the tax had not been paid and which had theretofore been removed from an unknown distillery to a place other than a bonded distillery warehouse, "to-wit, to the residence of [petitioner] located at about two and one-fourth miles southeast of Hot Springs, Arkansas, in Garland County." (R. 8–9.) Petitioner's motions to dismiss both counts of the indictment, on the ground that they failed to allege in sufficient detail the places where

the alleged violations occurred, were overruled (R. 17, 18–19). He waived a trial by jury (R. 17), was found guilty (R. 18, 19–20), and was sentenced generally to imprisonment for three years and to pay a fine of $1,000 (R. 23–25). On appeal, the judgment was affirmed (R. 100).

The liquor involved was obtained by a search under a warrant. Petitioner moved before trial to suppress the evidence thus seized on the ground that the affidavit on which the warrant was based failed to set forth the nature of the violation or a description of the property to be seized (R. 4–6, 9–12). He subsequently amended his motion to allege also that the facts set forth in the affidavit to establish probable cause were untrue in that the agent could not have observed the events which he described therein (R. 15–16).

The affidavit (R. 7–8) was sworn to by an investigator of the Alcohol Tax Unit and alleged that he had good reason to believe that there was located and concealed at petitioner's home, the location of which was fully described, certain property used as a means of committing a felony; and that the facts tending to establish the grounds of the application and the probable cause for believing that such facts existed were as follows:

> * * * affiant states that on May 3, 1946, between 2 and 3 p. m. he observed a taxicab occupied by two Negroes drive to the home of Martin Fletcher Lowrey, which

> is the premises above described, one of said Negroes carried from this house a carton, paper, placing same in the trunk compartment of said taxicab; after closing said trunk compartment both the Negroes entered the cab and left said premises and home of Martin Fletcher Lowrey; said taxicab was kept under constant observation by affiant and Alcohol Tax Unit Elwyn S. Gibson, on which searched one brown paper carton containing six one [*g*allon] jugs containing non-tax-paid distilled spirits was found in and taken from the trunk compartment on said taxicab, which was the only carton in said cab; that from the time said taxicab left the said home of Martin Fletcher Lowrey until it was searched as aforesaid, it had not stopped at any other point.

The warrant itself fully described the premises to be searched, listed the statutes believed to be violated, and described the property to be searched for and seized as "non-tax-paid distilled spirits" (R. 79–81).

The district court overruled the motion to suppress (R. 16–17), holding that the affidavit, considered in its entirety, did sufficiently describe the property to be seized, since it clearly appeared from the facts set forth to establish probable cause that the object of the search was to uncover non-tax-paid distilled spirits (R. 20–21); and that, in any event, under the Fourth

Amendment and Rule 41 (c) of the Federal Rules of Criminal Procedure, a search warrant is validly issued on the basis of an affidavit alleging probable cause without a specific description of the property to be seized, if the warrant itself contains a sufficient description of the place to be searched and identifies the property to be seized (R. 12–14, 21–22).[1] On appeal, the circuit court of appeals held that the inescapable import of the affidavit was that a warrant was sought in order to search for non-tax-paid distilled spirits, and that the affidavit was therefore sufficient under the Constitution and the Rules (R. 91–96).

ARGUMENT

1. Petitioner's contention that the decision below violates the Fourth Amendment by holding that an affidavit to support a search warrant need not contain a description of the property to be searched for and seized (Pet. 3, 6–7, 10–11, 12–14), ignores the fact that the foundation of the ruling below is the court's finding that the inescapable import of the affidavit was to allege that non-tax-paid liquor was the object of the search. The court specifically said (R. 96):

[1] The court heard testimony in respect of the allegation of petitioner's motion to suppress that the agent could not have seen the acts described by him (R. 27–71) and found that the agent did in fact see the events related in his affidavit (R. 22–23).

> If any other import reasonably had been possible from the affidavit than that the property for which the search warrant was being requested was "non-tax paid distilled spirits", as described in the affidavit, the affidavit, of course, would not have been sufficient. But that, as we have said, is not the situation. Or, if the commissioner had had to go outside the affidavit in order to complete the warrant, the affidavit equally would have been insufficient. Cf. *Poldo* v. *United States,* 9 Cir., 55 F. 2d 866, 868. That, again, is not the present situation.

We submit, therefore, that there is no occasion to decide whether Rule 41 (c) made any change in the requirements of Section 3, Title XI, of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 228, 18 U. S. C. 613, that "a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched." The affidavit here would have been sufficient under that statute. Fairly read, it is not essentially different from the affidavit before the Court in *Steele* v. *United States,* 267 U. S. 498, where, after setting forth the facts showing probable cause, the affiant alleged merely that "this affidavit is made to procure a search warrant to search said building * * * and to seize all intoxicating liquors found therein." 267 U. S. at 500. The instant affidavit, read as a whole, alleged that a warrant was sought to search

for non-tax-paid distilled spirits, and the warrant itself specified the object of the search as non-tax-paid distilled spirits. Under the *Steele* decision, that is a sufficient description of the property to be seized.

2. Petitioner's attack on the sufficiency of the indictment to allege the place of the offenses (Pet. 3, 11, 14–15), is clearly without merit. While we think that the first count is sufficient for the reasons stated in the opinion below (R. 99–100), it should be noted that the second count meets even the rigid test of detail for which petitioner argues, since it fully describes the location of petitioner's residence. And since the general sentence imposed on both counts is less than the maximum which could have been imposed on the second count alone, that count is itself sufficient to support the judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

JUNE 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947